Supreme Court, U. S.
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IN THE

Supreme Court of the United States

NO. 79-74

STEPHEN STEVERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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NO.

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Petitioner, Stephen Stevers, prays that a writ of certiorari issue to review the judgment herein of the Supreme Court of Ohio entered in the above-entitled case on April 12, 1979, which judgment dismissed petitioner's motion to appeal the decision of the Court of Appeals affirming petitioner's conviction on November 30, 1978. Petitioner seeks review of the judgment of the Court of Appeals.

No petitions for rehearing were filed.

OPINIONS BELOW

The judgment entry of the Supreme Court of Ohio is printed in Appendix A hereto. The opinion of the Court of

Appeals for Cuyahoga County is printed in Appendix B. No written opinion was rendered by the Court of Common Pleas, Cuyahoga County, Ohio, the case having been tried to a jury.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 12, 1979. No petition for rehearing was filed. Jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant, who is a police officer, in a state criminal trial is prejudicially deprived of his constitutional privilege against self-incrimination embodied in the Fifth Amendment to the Constitution of the United States made applicable to state cases by the Fourteenth Amendment when such defendant is in custody or deprived of his freedom and the minimum *Miranda* warnings are not all given to him; thereby rendering any finding of a waiver of the effectuation of such unenumerated rights invalid, and necessitating the suppression of any evidence obtained through such a proceeding?

2. Whether pursuant to the privilege against self-incrimination and the right of due process of law embodied in the Fifth Amendment to the Constitution of the United States, made applicable to state cases by the Fourteenth Amendment, no statement of an accused in a criminal proceeding which has been extracted by any sort of threat or

violence, or obtained by any direct or implied promises, however slight, or by extraction of any improper influence may be used in evidence against the accused, and must be suppressed?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V:

> No person shall. . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, then a Cleveland police officer, was indicted by the Grand Jury of Cuyahoga County, Ohio, on one count of bribery, and on one count of intimidation, pursuant to Ohio Revised Code, sections 2921.02 and 2921.03, respectively, on May 28, 1976.

Petitioner's case was tried to a jury before the Honorable Lucian C. Young, sitting by assignment to the Court of Common Pleas, Cuyahoga County, Ohio, commencing March 21, 1977.

On March 28, 1977, the jury returned a verdict of guilty on

the charge of bribery and not guilty on the charge of intimidation.

Appeal was perfected to the Court of Appeals of Ohio, Eighth District, which court affirmed the conviction effective December 11, 1978. Appeal to the Supreme Court of Ohio was taken by filing a notice of appeal in the Court of Appeals on January 5, 1979 with a subsequent filing to the Supreme Court of Ohio on February 5, 1979.

The Supreme Court of the State of Ohio on April 12, 1979 dismissed petitioner's appeal for the reason that no substantial constitutional question existed therein (case no. 79-154).

STATEMENT OF FACTS

Petitioner Stevers, then a Cleveland police officer, was charged with bribery and intimidating a witness, Mary Fockler Flynn, who was to testify in a trial against six members of the Hells Angels motorcycle club, who she claimed had raped and kidnapped her.

According to Flynn's testimony, she met with the petitioner at a local bar on March 19, 1976. At the time, petitioner was accompanied by his partner, John Simsic, and both officers were in uniform. Flynn stated that Stevers took her outside in the presence of Simsic and discussed the Hells Angels case. The conversation culminated in petitioner telling Flynn that the Hells Angels would pay her for her not testifying against them. Petitioner gave Flynn his telephone number, and that of his brother, Dennis Stevers, also a Cleveland policeman. At trial, Flynn testified that she had several meetings with petitioner and that on one occasion she was threatened in the presence of petitioner by several club members.

After the threat, Flynn tstified that she agreed to take the bribe money and that petitioner took her to her apartment to pack and drove her to the airport, and purchased a ticket for her to fly to Denver.

Petitioner and his brother, Dennis Stevers, were summoned to the Internal Affairs Offices of the Cleveland Police Department for questioning on May 26, 1976. Petitioner accompanied Dennis but waited downstairs in a garage. After twenty minutes of questioning, the detective advised Dennis that they would want to talk to his brother, petitioner. Dennis told them that he was in the garage and the detective went there and requested he come with him to the interview room. Petitioner complied with the request and his brother accompanied him.

A secret tape recording of the interview was made during questioning. At the outset of the interview, petitioner was requested to turn over his service revolver to the detective, and the following conversation took place. The subject conversation is reproduced in Appendix C and is attached hereto and incorporated herein.

Lengthy questioning consisting of 27 transcribed pages ensued during which petitioner was never read the *Miranda* warnings, although the detective stated that they had previously advised his brother of his rights, and asked petitioner if he knew of his rights, he replied that he knew them but could not give them to the detective. He was never advised of his right to remain silent.

During the interrogation, the detectives advised petitioner that unless he cleared his brother and partner, Simsic, of involvement, they would be indicted by the Grand Jury, be suspended from the force, and tried for bribery.

Prior to trial, the defense moved to suppress the taped conversation and transcript of same on the grounds that the

petitioner was not given the *Miranda* warnings completely, and that the statement was coerced and hence involuntary. This motion was denied, and at trial the tape was admitted into evidence as part of the prosecution's case, and the transcript given to the jury to aid in its deliberations.

In his testimony, petitioner admitted meeting with Flynn and attempting to "pick her up" but denied any bribery or intimidation. He further testified that the statement he gave was involuntary due to threats made against his brother and partner if he didn't tell the detectives all he knew.

Appeal raising the aforementioned issues was taken to the Court of Appeals, which affirmed the trial court's holding that petitioner was not entitled to the *Miranda* warnings because he was not in custody, that in any event, he waived same, and that his statements were voluntary. The Supreme Court of Ohio dismissed petitioner's appeal stating that it was want of a substantial constitutional question.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Ohio, in affirming the decision of the Court of Appeal, Cuyahoga County, Ohio has decided federal questions of substance in a way not in accord with applicable decisions of this court, and in clear violation of pertinent provisions of the Constitution of the United States. Further, a serious question of federal policy with respect to the implementation of the rights guaranteed by *Miranda v. Arizona* exists.

I.

WAIVER OF THE EFFECTUATION OF MIRANDA RIGHTS.

It is axiomatic that law enforcement officers must advise all persons, including police officers, of the warnings set forth in the above question presented, when such person is in custody or deprived of freedom of action in any significant way. Equally clear is that fact that the advising of the guaranteed *Miranda* rights is a minimum requirement, a prerequisite to a waiver of the same.

The clear import of *Miranda v. Arizona,* 484 U.S. 436 (1966), is that the enumerated warnings are an absolute threshold requirement which must be met before the issue of waiver can be approached. Each of the warnings must be given, it not being sufficient to give some but not all, *ID.*

Miranda provides that "the defendant may waive *effectuation* of these rights, provided the waiver is made voluntarily, knowingly and intelligently. (Emphasis added), *ID.* It is important to note the court's use of the word "effectuation" which is defined as the "carrying out", or the "bringing about". Clearly the court in *Miranda* allows for a waiver of the *carrying out* of a defendant's Constitutional rights once the *Miranda* warnings are given, but it does not provide for a waiver of the *giving* of the warning. Since the *Miranda* warnings were never given to the defendant in the case at bar, a finding of waiver, by the Court of Appeals, and in affirmance of the same by the Supreme Court of Ohio, was clearly erroneous. (See, for example, *Westover v. United States,* 484 U.S. 436 (1966) (companion case to *Miranda*) where the court stated that on the facts of the case it could not find that defendant knowingly and intelligently waived his rights, since no adequate warnings had been given).

In the present case, the warnings were never properly given to petitioner. Accordingly, no waiver of same could be effectual. *Miranda v. Arizona,* supra. Therefore, only the threshold question remains: was petitioner in custody or deprived of his freedom of action in any significant way during the course of his interrogation, thereby making it mandatory that he be advised of his rights?

Unfortunately, there was no case which clearly defines what in 'custody' or 'deprivation of freedom of action in any significant way' means. Each case must be decided on its own facts and not by mere color-matching with others. See, e.g., *Mincey v. Arizona,* 57 L.Ed. 2d 290, 304 (1978).

Accordingly, this Court is being asked to grant review to determine whether an officer subjected to interrogation by his superior officers in a stationhouse, having been relieved of his service revolver, and unknown to him being already scheduled to be presented for indictment by the prosecutor, is in custody or deprived of his freedom of action in any significant way.

Although no case is dispositive of this point, some offer guidance. In *Dickerson v. State,* 257 Ind. 562 (Ind. Sup.Ct. 1972), the court held that a defendant who was at a police station on other business was entitled to the *Miranda* warnings where he was informed that he was accused of rape but not under arrest for same, and was asked to submit to questioning. See also, *Krueger v. State,* 92 Nevada 749 (1976); *U.S. v. Lackey,* 413 F.2d 544 (7th Cir. 1969).

Applying the teaching of these cases to the present case, it is clear that petitioner was in custody, was deprived of his freedom of action in a significant way at the time of interrogation, and accordingly, this court should grant certiorari to review the decision of the Supreme Court of Ohio which affirmed the Court of Appeals.

Absent such review, the police would be given unfettered authority to request any person they knew for certain would be indicted in the very near future to submit to questioning without advising him of his basic Constitutional guarantees in an effort to convict him from his own mouth. See, e.g. *Spano v. New York,* 360 U.S. 315 (1959), wherein the Supreme Court condemned such methods long before *Miranda.*

Clearly, to allow such questioning absent the warnings, would be to sanction an obvious circumvention of *Miranda's* intent to protect persons from incriminating themselves in situations where the authorities know they will likely be placed in custody and tried for a serious offense. Thus review of this decision is both warranted and necessary.

II.

THE COERCED CONFESSION

As this Court has recognized in *Miranda,* the enumerated warnings are only a minimum protection that must be offered to a person during custodial or similar interrogation. Regardingless of whether or not the warnings need be or are given, a person's statement must be voluntary to be admissible against him. *State v. Chase,* 55 Ohio St. 2d 237 (1978).

An independent evaluation of the totality of circumstances attendant to the giving of a statement must be made to determine if the statement was the product of rational intellect and free will. *Mincey v. Arizona,* supra, *State v. Chase,* supra. If any sort of threat, or violence, or direct or implied promise is made, however slight, or any improper influence used, the statement must be deemed involuntary

and, hence, inadmissible for any purpose. See, e.g., *Mallory v. Hogan,* 378 U.S. 1, 7 (1964); *Jackson v. Denno,* 378 U.S. 368, at 378 (1964).

In the present case, petitioner was told in no uncertain terms by superior officers that without his statement, both his brother and partner could not be cleared of charges, would be indicted, suspended from the force, and tried. Further, he was told that absent a statement, his brother, who was present during questioning and his partner would have their lives ruined by his failure to act.

Such conduct is, without doubt, calculated to force a statement through threat, coercion, and inducement. As reflected by the following quotation, these are the exact methods deplored by this Court and deemed patently unconstitutional as violative of our Fifth and Sixth Amendment freedoms:

> We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused, after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eye witness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. . . . they were rather concerned primarily with securing a statement from defendant on which they could convict him. The underrating intent of the officers to extract a confession from petitioner is therefore patent. Where such an intent is shown, this court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed the conviction on facts less compelling that these . . . . *Spano v. New York,* supra. at 323-324.

Here, as in Spano, a subject was tricked into giving an incriminating statement by use of threats that a police

officer's career and life would be ruined unless the accused "talked". Indeed a review of the attached transcript of the subject interview of petitioner will reveal, at the very least, the same amount of coercion as existed in *Spano.*

Therefore, petitioner asserts that certiorari is warranted on his issue.

CONCLUSION

Petitioner prays that certiorari is both necessary and mandated, in the present case. Without such review, the import of *Miranda* will be seriously undermined.

Respectfully submitted,

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APPENDIX A

SC-18A 79-3-1890 Baldwin Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 79 *TERM*

To wit: April 12, 1979

tate of Ohio,
Appellee,

vs.

teve Stevers,
Appellant.

No. 79-154

APPEAL FROM THE COURT OF APPEALS

for Cuyahoga *County*

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 14th *day of* June *19* 79

THOMAS L. STARTZMAN *Clerk*

Deputy

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 37812

DEC 2 1976

TATE OF OHIO

APPELL EE

-vs-

EPHEN STEVERS

APPELL ANT

APPEAL FROM

COMMON PLEAS COURT

No. 26175-CR.

JOURNAL ENTRY
AND
OPINION

DATE NOV 30 1976

RIGAN, C.J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The defendant appellant, Stephen Stevers, was indicted on one count of bribery (R.C. §2921.02) and one count of intimidation (R.C. §2921.03). The chief witness for the prosecution at the trial was Mary Fockler Flynn. Mrs. Flynn testified that she had been a complaining witness in a case involving charges of rape, aggravated robbery, feloneous assault and kidnapping against six members of the Hell's Angels' motorcycle gang (Tr. 211). She testified before the

grand jury on these charges on March 16 and 17, 1976 (Tr. 210).

Mrs. Flynn further testified that she was with her friend, Penny Walsh, and another friend at a bar known as the Brick Cottage on March 19 (Tr. 211). While they were there, two Cleveland policemen entered the bar (Tr. 212). The policemen were identified as John Simsic and the appellant. Both men were in full uniform at the time (Tr. 218). Shortly after entering the bar, the policemen began talking with Flynn and her friends. It is not clear from Flynn's testimony whether the conversation was initiated by the policemen or Penny Walsh (Tr. 213, 358).

Flynn testified that the appellant asked her to step outside for a moment with him (Tr. 361). After they had done so, the appellant told her that some of the members of the Hell's Angels were willing to pay her money in exchange for her not testifying against them (Tr. 213). She further testified that the appellant told her that she may receive as much as Ten Thousand Dollars ($10,000) (Tr. 213, 362). Flynn told the appellant that she wanted to think about the offer. The appellant gave her a piece of paper with two phone numbers on it; his brother's and his own (Tr. 213). The couple then went back into the bar (Tr. 218, 364). Flynn stated that the conversation lasted approximately fifteen minutes (Tr. 275, 365).

The following night, March 20, the appellant again met Flynn at the Brick Cottage (Tr. 218, 368-69). Flynn told the appellant that she had not made a decision concerning his offer of the previous night (Tr. 373). The appellant then wrote down her phone number and told her he'd call her later (Tr. 218, 371-73). Flynn testified that the second conversation lasted about five minutes (Tr. 219, 275).

On March 23, Flynn met with Detectives Bennett and

Neal of the Cleveland Police Department and told them of the appellant's offer (Tr. 223-24). She also gave the police the appellant's badge and telephone numbers (Tr. 224). The foliowing day, March 24, Flynn gave a statement to the police (Tr. 224, 333). On March 25, Flynn met with Detective Bennett and Lieutenant Janero of the Internal Affairs Branch of the Cleveland Police Department (Tr. 226). While at the police station and in the presence of Bennett and Janero, Flynn called the appellant using the phone number he had given her (Tr. 227). The conversation between the two was recorded on tape by the police.

During the conversation, the receiver of the call identified himself as "Steve" and "the cop". He also stated that the offer was no longer available because the price was too high. The person also said he would try to negotiate a lower price and call Flynn with the results in a week. Flynn identified the voice on the recording as the appellant's. She testified that she recognized his voice from their two prior face-to-face conversations (Tr. 244). The statement shows that no express reference was made in the conversation to the Hell's Angels. The telephone conversation was reduced to writing and introduced into evidence at the trial. The record shows that the tape recording of the conversation was played to the jury, although the transcript was not introduced into evidence.

Flynn met with the appellant at the Brick Cottage on April 6 in response to his call (Tr. 284, 394). Flynn testified that the two walked down Euclid Avenue toward Mayfield Road (Tr. 397, 632). During the walk, the couple was approached by two other persons, one of which was a member of Hell's Angels. (Tr. 287-88, 408-09). At that time the appellant showed Flynn some money that he had in his coat pocket (Tr. 291, 402). The money, amounting to One Thousand Dollars

($1,000), was to be used by Flynn to get out of town (Tr. 403). The three people threatened that if she refused, the money would be used to hire someone to kill her (Tr. 292, 403, 411).

After agreeing to leave town, the appellant took Flynn back to his car. He then proceeded to drive her back to her apartment to pack (Tr. 414). The appellant returned about twenty minutes later to pick her up and take her to the airport (Tr. 294, 414). While waiting for the appellant, Flynn called her brother to ask him what to do. She testified that her brother told her to leave with the appellant (Tr. 416).

The appellant picked Flynn up at the apartment, and after dropping his son off with his wife, continued on to the airport (Tr. 294, 422). There he purchased an airline ticket for Flynn. She left approximately one hour later on a flight to Denver. A few days later, Flynn returned to Ohio, staying with her brother in Akron (Tr. 317). She was subsequently contacted by members of the Internal Affairs Division of the Cleveland Police Department.

The appellant's brother, Dennis Stevers, who is also a Cleveland policeman, was ordered to meet with members of the Internal Affairs Division on May 26, 1976 (Tr. 9, 78, 85, 90). Dennis was questioned concerning his relation to the alleged bribery activities of his brother (Tr. 81, 85). The questioning lasted approximately twenty minutes (Tr. 108). At the termination of the session, the detectives told Dennis that they wanted to speak with the appellant. Dennis informed them that his brother was outside (Tr. 78, 109). The appellant was asked to come in by Detective Bennett (Tr. 13, 27, 138).

Prior to any questioning, Lieutenant Janero asked the appellant to turn over his service revolver (Tr. 16, 79, 110, 137). The appellant complied with this request. The detective then began advising the appellant of his constitutional rights, but was interrupted by the appellant (Tr. 22, 58). The appellant told the police he knew what the rights were (Tr. 20-22, 43-48). The record reflects that the appellant's brother was present the entire time the appellant was being questioned (Tr. 9, 78, 675). At the end of the questioning, the appellant was returned his gun and allowed to leave (Tr. 25, 146). He was also informed by the detectives that they had more questions to ask him, and that he should return the next day after consulting with an attorney (Tr. 24, 103-04). A tape recording of the interrogation was subsequently reduced to writing and introduced into evidence. Like the recording of the telephone conversation of March 25, the recording of the May 26 interrogation was played for the jury although the transcript was not introduced into evidence.

The appellant testified that he met Flynn at the Brick Cottage on March 19 and that they had exchanged telephone numbers (Tr. 616, 619-22, 656-58). He also stated that he received a phone call from her on March 25, but that they did not talk about her role in the pending Hell's Angel's case. (Tr. 622, 626-29). The appellant also admitted driving Flynn to the airport on April 6. (Tr. 638, 685). He denied, however, either purchasing her airline ticket or giving her any money (Tr. 642, 689). He also denied attempting to bribe or intimidate her (Tr. 684, 689).

The jury returned a verdict of guilty on the charge of bribery and not guilty on the charge of intimidation. From the conviction, a timely notice of appeal was filed. Five assignments of error have been raised on appeal.

I. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MADE BY THE DEFENDANT IN RESPONSE TO POLICE INTERROGATION PRIOR TO THE POLICE FULLY INFORMING DEFENDANT OF HIS RIGHTS UNDER *MIRANDA V. ARIZONA.*

II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS STATEMENTS OF CONFESSION THAT WERE NOT VOLUNTARILY MADE BY THE DEFENDANT.

III. THE TRIAL COURT ERRED WHEN IT ALLOWED THE TAPE RECORDING OF THE MARCH 25, 1976 PHONE CONVERSATION TO BE PLAYED TO THE JURY.

IV. THE TRIAL COURT ERRED IN REFUSING DEFENDANT'S COUNSEL AN IN CAMERA INSPECTION OF THE REPORTS OF DETECTIVE BENNETT.

V. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY FOR ASSISTANCE IN THEIR DELIBERATION THE TRANSCRIPTS OF THE MARCH 25, 1976 PHONE CONVERSATION AND THE MAY 26, INTERROGATION.

I.

As his first assignment of error, the appellant argues that the Trial Court erred by not granting the motion to suppress his pre-trial statement to the police. Prior to the commencement of trial, the appellant moved to suppress the recording of the May 26 interrogation. At the conclusion of

the suppression hearing, the Trial Court overruled the motion on the grounds that the appellant fully understood and waived his constitutional rights against self-incrimination (Tr. 205). The Court also stated that the appellant submitted to the questioning voluntarily and was not in custody at the time (Tr. 204-05).

The procedure for advising a suspect of his constitutional right against self-incrimination was set out by the Court in *Miranda v. Arizona* (1966), 484 U.S. 436, in which the Court stated:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* at 444.

In the present case the record shows that prior to the questioning, the detectives told the appellant he had a right to an attorney. The appellant replied that he understood the rights, but that he could not remember them. The detective then told the appellant that anything he said could be used against him. A card containing the rights was given to the appellant. When asked if he had read the card, the appellant replied that he knew what they were. At the suppression hearing the appellant testified that he had been a Cleveland policeman for seven years (Tr. 146). He also recited the advisory rights set out in *Miranda* and stated that he knew what they were on May 26 (Tr. 148).

The mere fact that a suspect is a policeman does not mean that he is not entitled to be advised of his constitutional rights. *Garrity v. New Jersey* (1967), 385 U.S. 493, 500. Where, however, a person waives his constitutional rights, the fact that he is a policeman is evidence to show the

voluntariness of his waiver. In the present case the record shows that the appellant was fully aware of his constitutional rights at the May 26 interrogation. Moreover, the detective's efforts to advise the appellant of these rights, notwithstanding the appellant's seven years experience as a policeman, were thwarted by the appellant's own interruptions. In addition, the record further states that later during this questioning session, the appellant was warned that he had better talk to an attorney before answering the questions. Finally, at the conclusion of the hearing the appellant was told that the police had further questions to ask him, but that they would wait until he had an opportunity to consult with an attorney before doing so.

Examining the record of the interrogation session, the police officers made considerable efforts to safeguard the appellant's constitutional rights. Considering the totality of the circumstances, the record supports the Trial Court's conclusion that the appellant knowingly and voluntarily waived his constitutional rights. *Cf. State v. Doaks* (1975), 49 Ohio App.2d 161.

In addition to finding that the appellant waived his constitutional rights, the Trial Court also stated that the appellant was not in custody at the time he was questioned. The procedure set out in *Miranda* for advising a suspect of his constitutional rights was limited to a custodial interrogation. 384 U.S. at 444, 469. When, however, a person is not in custody when being questioned by the police, the police are not obliged to advise him of his *Miranda* rights. *Beckwith v. United States* (1976), 425 U.S. 341, 345. *See also Oregon v. Mathiason* (1977), 429 U.S. 492.

At the suppression hearing both Detective Bennett and Lieutenant Janero testified that the appellant's brother had been ordered to appear for questioning with the Internal

Affairs Division of the Cleveland Police Department on May 26. The record shows, however, that the appellant was not ordered to appear. Moreover, the detectives were not aware that the appellant was in the building until they were informed by the appellant's brother that he was outside the room. Janero and Bennett testified that the appellant was invited into the room for questioning. They further stated that the appellant was not under arrest and was able to leave at any time. The record shows that at the conclusion of the session, the appellant left the room with no restraints. On the other hand, the appellant testified that he took the invitation to submit to questioning from a superior officer as an order. He further stated that he did not feel that he was free to leave at any time during the session.

The testimony on the issue of whether or not the appellant was in custody is in direct conflict. Thus, the determination of the issue turns on the credibility of the witnesses. Credibility, however, is a question of fact, not law, and should be resolved by the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230. When there is sufficient evidence in the record to support the judgment of the trier of fact, that judgment should not be disturbed on appeal. Therefore, the Court cannot hold as a mater of law that the Trial Court erred in holding that the appellant was not in custody at the time he was questioned by the police. Consequently, the police were not obliged to advise him of his constitutional rights, notwithstanding their attempts to do so. Consequently, the Trial Court did not err by overruling the appellant's motion to suppress the pre-trial statement. The appellant's first assignment of error is not well taken.

II.

As his second assignment of error, the appellant argues that even though he may have been fully aware of his constitutional rights, the statements given in the May 25 session were given involuntarily. The appellant argues that the police threatened him with jeopardizing his brother's career as a policeman, and therefore, the statements were a product of coercion.

Notwithstanding the safeguards set out in *Miranda,* a statement involuntarily given is inherently untrustworthy, and therefore not admissible. *Harris v. New York* (1971), 401 U.S. 222. *See also State v. Kassow* (1971), 28 Ohio St.2d 141. In *Gerrity v. New Jersey, supra,* the defendant policeman was suspected of fixing traffic tickets. Prior to being questioned in this matter, the defendant was informed of his right to remain silent. He was also told that if he refused to talk, he would be subject to dismissal. The defendant's statements were ultimately used against him in a subsequent criminal trial. On appeal, the Supreme Court held that the police could not impose this penalty on the defendant's exercise of his constitutional rights. The Court concluded by stating that a statement given under these conditions was a product of coercion, and therefore not admissible. *Id.* at 497. *See also Gardner v. Broderick* (1968), 392 U.S. 273.

The appellant's argument that his statements were a product of coercion is not borne out by the record. A review of the record indicates that the appellant was under no threat of dismissal when he agreed to submit to questioning. Moreover, the appellant's brother was present during the entire session so the police could not attempt to play one statement off against the other. In addition, the record

reflects that no threats were made to the appellant by the police concerning his brother's career. A review of the record in its entirely indicates that the appellant's statements at the interrogation were not given involuntarily, and therefore, were admissible at the trial as competent evidence. The appellant's second assignment of error is overruled.

III.

The appellant argues as his third assignment of error that the Trial Court erred by admitting into evidence the tape recording of the March 25 telephone conversation between Flynn and the appellant. The appellant argued that the voice on the phone was not sufficiently identified as that of the appellant's to be admissible into evidence.

In *Bedford Hts. v. Tallarico* (1971), 25 Ohio St.2d 211, the Court held that when the criminal act was itself the telephone call, the testimony of the person with whom the defendant spoke was not admissible unless the witness testified that he recognized the voice as the defendant's. *Id.* at 216-17. In the present case Flynn testified that she recognized the appellant's voice in the telephone conversation on March 25 (Tr. 239, 243). She further testified that she had remembered the appellant's voice from their two prior meetings. In addition, Flynn testified that the transcript of the conversation was not different from the conversation as she remembered it (Tr. 240). Finally, Lieutenant Janero testified that the tape had been in his sole possession from the day it was made until it was presented at trial (Tr. 256-57).

On the basis of the testimony in the record, the appellant's voice was sufficiently identified to allow the recording to be admitted into evidence. Therefore, the Trial Court did not err

by allowing the recording into evidence. The appellant's third assignment of error is without merit.

IV.

In assignment of error number four, the appellant argues that the Trial Court erred by refusing to conduct an in camera inspection of the police report of Detective Bennett. The record shows that Bennett did not refer to this report during his direct examination. When a police officer or his agent refers during his testimony to a report previously made, the Court may not refuse to inspect the report for inconsistencies prior to cross-examination of the witness. *State v. Taylor* (1947), 83 Ohio App. 77. When, however, the police report is not used during direct examination, the report is not subject to inspection. *State v. Strain* (1948), 84 Ohio App. 229, 231.

The rule set out in *Strain* and *Taylor, supra* was reiterated by this Court in *State v. Smith* (1976), 50 Ohio App.2d 183. In that case the majority of the Court held the defendant was not entitled to inspect a police report which was not used by the officer when testifying. *Id.* at 201. Moreover, a police report which does not contain a written summary of the defendant's statements is not subject to inspection by the defendant. *Id.* at 202. *See also* Ohio R. Crim. P. 16(B)(2). As was already stated, Detective Bennett did not refer to his prior written report during his direct examination. Consequently, the Trial Court was not obliged to conduct an in camera inspection of this report. The appellant's fourth assignment of error is overruled.

V.

The appellant argues as his fifth assignment of error that the Trial Court erred by allowing the jury to use the transcripts of the recordings of the March 25 telephone conversation and the May 26 interrogation. The record reflects that while neither of the written transcripts were admitted into evidence, the tape recordings from which the transcripts were made were played during the trial and later admitted into evidence.[1]

The appellant bases his argument on the premise that the two tape recordings should not have been admitted into evidence. As was already determined in the consideration of the first three assignments of error, the Trial Court did not err by admitting this evidence. The transcripts in the present case were used merely as an aid to understand the recordings. In addition, the Trial Court expressly instructed the jury that the transcripts were not evidence and that the jury could only rely on what they actually heard from the tapes. The record shows that no objection was raised during either the suppression hearing or the trial with respect to the accuracy of these transcripts. The record reflects also that no showing of prejudice was made by the appellant resulting from the use of the transcripts by the jury. Consequently, the appellant's fifth assignment of error is not well taken. The appellant's conviction is affirmed.

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[1]The record reflects that the transcripts themselves were marked as exhibits and offered into evidence during the trial (Tr. 238, 519). The Trial Court ruled that the transcripts could not be admitted into evidence, but could be used by the jury to assist them in understanding the tapes (Tr. 582-83, 584-92).

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It is ordered that appellee(s) recover of appellant(s) its costs herein taxed

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRUPANSKY, J.,

PATTON, J., CONCUR.

John V. Corrigan, JUDGE

For plaintiff appellee: John T. Corrigan

For defendant appellant: James S. Carnes

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is the announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX C

D. . . . could I take your gun.
SS. Oh oh.
D. I'd, I'd just feel better.
SS. Oh, okay, I understand that.
*** (unintelligible)
D. We've got a definite problem.
SS. Okay.
D. Look, we're involved in investigating a felony. Your involved in the (unintelligible)
SS. A felony.
D. . . . in a felony. A bribery case. We've got to advise you right off the bat. We talked to your brother. He hasn't said much of anything. He was advised that you have a right to an attorney. The rights that you knowof. Do you want me to read them to you?
SS. No, I understand thatm. I know them but I can't give them to you.
D. You have a right to an attorney. . .
SS. I know.
D. Anything you say can be held against you. Have you read your rights?
SS. I know em. I know em.
D. . . . We were going over some basic information here. . . . you live with your brother.
SS. Yeah, off and on, like sometimes I feel like (unintelligible)
D. Will you give us your ex-wife's address, please.
SS. Yeah, 304 (unintelligible)
D. What's that?
SS. Willowick.

D. I've got to advise you of your rights off the bat. If you don't want to talk to us without an attorney, that's fine. If you'd like to go ahead with whatever we're going to talk about, we'll go ahead. If you want to stop at any time, you can stop.
SS. Okay, yeah, go ahead.

* * * * *

D. Well, we have some obvious allegations to this, we have some statements.
SS. Allegations of what?
D. About the bribery.
SS. I don't know nothing about it.
DS. Involving me?
D. We don't know that, that's why we're here.
DS. I aint getting involved in this.
D. Whoever wrote that note, whoever wrote that note involved you. I didn't involve you, I don't know your telephone number.
DS. All right.
D. Are you involving your brother in a bribery, Steve?
SS. I'm not involving my brother in anything.

* * * * *

D. What we want to know how bad you got your brother involved?
SS. My brother's not involved in anything.
D. Yes he is. You put him right in it, Steve. Let's face it, you never should have wrote Dennis' name on that paper, you never should have wrote his telephone number. You do your own business. Unless Dennis is involved. Now if you made it look like Dennis is involved.
D. I honestly don't believe he was.
SS. He is not involved.

D. Well, he is. Or he wouldn't be here.
SS. Well he not involved in anything that I know of.

* * * * *

D. Okay, Steve, it gets deeper and deeper and deeper and deeper. No question. we're here because you put your brother in a trick bag.
SS. How did I put him in a trick bag?
D. You signed his name and telephone number. The broad called him.
SS. What do you want me to do?
D. Do what you have to do. Do what you think is best for you and your brother.
SS. Right.
D. Now if he is involved we are going to find out. If he is not involved you can get him out of the deal easy.
SS. How can I get him out of there. Tell you that he's not involved?
D. Yeah.
SS. I just did. He's not involved.
D. Now by saying that you are telling me, or telling us, that by saying that that you are involved.
SS. No, I never say that.
D. Well, how do you know he's not involved then?
SS. Cause I know he's my brother. I know what he's up to.
D. Does he know what your up to?
SS. I don't know. He may and he may not.
D. This is what we want to know. What is what we gotta know. Did he have knowledge of this?
SS. Knowledge of what?
D. What what occurred.
SS. I don't have knowledge of what occurred.
D. You say that you didn't go to the Red Brick, you didn't talk to the girl?

SS. I go to the Red Brick, but I don't. . .
D. You didn't give this girl the telephone numbers, you didn't receive a phone call?
SS. Now, what do you want to say?
D. Say what you have to say, I just said it.
SS. Hum.
D. The way it looks right now, both of you are going to get indicted.
SS. That will be awful, Lieutenant.
D. I know it is but what can I do? I just, your brother is implicated because of you. You're the only one can get him out from under.
SS. I am telling you he is not involved.
D. I think you're not stupid. You understand what's happening here. It is not a funny thing. We don't like this stuff what we must do. You can certainly understand that?
SS. Yeah.
D. I don't like bringing you down here and I don't like bringing him down here.
SS. I dig it.
D. I can't tell you what to do. All I can tell you is you getta right to an attorney. He is gonna be indicated, that's the way things are standing right now.
SS. (Unintelligible)
D. I know in my heart that I aint wrong about you. But him, I have my doubts.
D. Mike, do you have any of that. . . One more point, we have. . . Do you have it available?
(Conversation between detectives)
D. But here's our point. Now look, if you are involved in something, what I am trying to say right now, if you are involved in something, your brother aint involved in

(unintelligible) We put you at the Red Brick Lounge with not only one person but three other people. We put you in there the next day at the Red Brick Lounge (unintelligible) You were together that day.
SS. I was.
D. We're not trying to hurt anybody we don't have to hurt.
D. Steven, you made your bed baby, you lay in it, right?
D. If he is involved so be it. And we don't know what a Grand Jury will do. You made it, it's my opinion and it's only my opinion, you made it look like he was hip to this whole thing.
SS. Why?
D. You gave that girl his number.
SS. He don't know nothing.
D. I'm aware of that. I know that.
SS. I just told you he don't know nothing.
D. The Grand Jury don't know that.
SS. Well, do I gotta tell them?
D. You don't have to tell them anything.
SS. Well, I said he doesn't know (unintelligible). He don't know nothing about anybody.
D. Steven, . . .
SS. I didn't tell him a thing.
D. I'm inclined to agree with that. Now whether you can believe. . .
SS. It's the truth.
D. But you know that I can't go to the Grand Jury, we can't go to the Grand Jury with just what we told you here. We know. . .

* * * * *

D. Whatever you want to say. That's up to you. (unintelligible) only what you got to say (unintelligible).

I'm going to tell you what we got. We got Simsic going to the Grand Jury.

SS. Simsic aint involved.

D. We got your brother going to the Grand Jury.

SS. Neither is my brother.

D. We got you going to the Grand Jury. You got his life on the line, his career. You got Simsic's life. . .

SS. Not life.

D. I'm talking about a career.

SS. Oh, I'm sorry.

D. His police career and Simsic's police career is on the line.

SS. Believe me, he's not involved. Don't even take it to the Grand Jury, with him or Simsic.

D. They got to go. They got to go. (unintelligible)

SS. I'll bail them out. What do you want me to say?

D. I can't tell you. We just want you. . . (unintelligible)

SS. (unintelligible) He aint involved in anything.

D. Do you know what you have to do to. . .

SS. What do I have to do?

D. You have to tell the truth about what happened.

* * * * *

D. Maybe we're not making it clear (unintelligible)

SS. All right. You lay it on the line for me.

D. All right, you're going to get indicted Wednesday.

SS. For what?

* * * * *

D. (Unintelligible) We weren't gonna even talk to you. I'll tell you straight out, we weren't even going to talk to you. We were gonna have you indicted and that was gonna be the end of it. But, in good conscience we could not do that without giving you a chance to explain your

side of it and the fact that you brother's not involved.

* * * * *

D. You I got to go with. I don't have to go with him and I don't have to go with Simsic. Because what you said. It'll be just a fucking routine. They might indict him. Hey,

D. (unintelligible) You get yourself in a trial and need to take him, or Simsic.

SS. (unintelligible)

D. It might end up, they might find him guilty or innocent. They might find you innocent too.

SS. Yeah, I know. Well, like I said, it's no use, you know yourself there's no reason to take him or Simsic. Don't say (unintelligible) because you know it as well as I know it. That you don't have to take him or Simsic, that you know they're not involved too.

D. Right, I know that.

SS. And I'm not going to set here and admit to anything myself. You know that we well as I do.

D. See, when we go to the Grand Jury all we can do is present the facts to the Grand Jury.

SS. Okay.

D. The fact is that you wrote his name and his telephone number. . .

SS. Does the fact that. . . Is that enough to indict him?

D. (unintelligible) I don't know. He's a police officer. You remember that, and he's supposed to be sharper than the average citizen. Okay, the Grand Jury is going to say policeman and you know right off the bat.